

Legal Liability Considerations When Layoffs are Needed

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TOPICS

The legal considerations involved with layoff and recall of employees vary depending on the type of job position affected. This presentation will cover the following topics:

1. Layoff and Recall of Teachers
2. Layoff and Recall of Non-Teaching Professionals
3. Layoff and Recall of Administrators
4. Support Staff
5. Unemployment Considerations

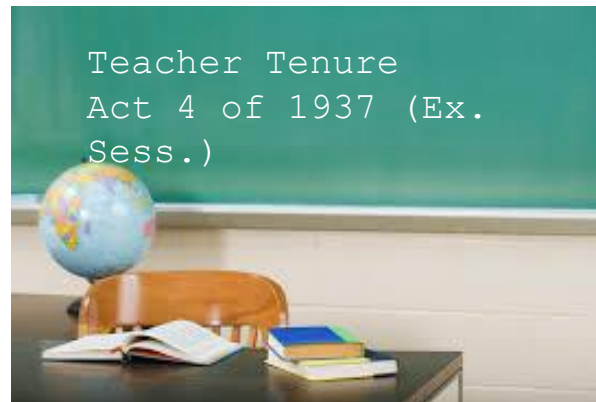


LAYOFF AND RECALL OF TEACHERS



GENERAL PRINCIPLE OF COLLECTIVE BARGAINING

Layoff and recall ARE considered MANDATORY subjects of bargaining. In the past, public school employers had to collectively bargain over layoff and recall of teachers. In addition, public school employers had to be aware of the requirements of the Teachers' Tenure Act which protected tenured teachers over probationary teachers in a layoff situation.



GENERAL PRINCIPLE OF COLLECTIVE BARGAINING

The legal considerations have radically changed. Layoff and recall are now **PROHIBITED** subjects of bargaining.

Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380.1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit.

MCL 423.215(3)(k)

ADDITIONAL TOPICS

Other topics which are prohibited subjects of bargaining that may affect layoff and recall decisions:

1. Placement of Teachers, MCL 423.215(3)(j)
2. Evaluation of Teachers, MCL 423.215(3)(l)
3. Observations of Teachers Relating to Evaluations, MCL 423.215(3)(n)



GENERAL PRINCIPLE OF COLLECTIVE BARGAINING

All of these decisions involving prohibited subjects of bargaining are within the sole authority of the public school employer to decide.

Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

MCL 423.215(4)

GENERAL PRINCIPLE OF COLLECTIVE BARGAINING



Michigan courts and the Michigan Employment Relations Commission have interpreted the scope of prohibited subjects very broadly, e.g., teacher placement not only involves teacher transfer but also posting and bidding procedures.

See Ionia Public Schools v Ionia Education Association, 311 Mich App 479 (2015); affirming, 28 MPER P58 (2014).

SECTION 1248

Section 1248 of the Michigan Revised School Code, MCL 380.1248, fills the void left by prohibited subjects. Section 1248 governs the layoff and recall of teachers.

(1) For teachers, as defined in section 1 of article I of 1937 (Ex Sess) PA 4, MCL 38.71, all of the following apply to policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position by a school district or intermediate school district:

(a) Subject to subdivision (c), the board of a school district or intermediate school district shall not adopt, implement, maintain, or comply with a policy that provides that length of service or tenure status is the primary or determining factor in personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position.

SECTION 1248 (CONT'D)

(b) Subject to subdivision (c), the board of a school district or intermediate school district shall ensure that the school district or intermediate school district adopts, implements, maintains, and complies with a policy that provides that all personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, are based on retaining effective teachers. The policy shall ensure that a teacher who has been rated as ineffective under the performance evaluation system under section 1249 is not given any preference that would result in that teacher being retained over a teacher who is evaluated as minimally effective, effective, or highly effective under the performance evaluation system under section 1249. Effectiveness shall be measured by the performance evaluation system under section 1249, and the personnel decisions shall be made based on the following factors:

SECTION 1248 (CONT'D)

(i) Individual performance shall be the majority factor in making the decision, and shall consist of but is not limited to all of the following:

(A) Evidence of student growth, which shall be the predominant factor in assessing an employee's individual performance.

(B) The teacher's demonstrated pedagogical skills, including at least a special determination concerning the teacher's knowledge of his or her subject area and the ability to impart that knowledge through planning, delivering rigorous content, checking for and building higher-level understanding, differentiating, and managing a classroom; and consistent preparation to maximize instructional time.

(C) The teacher's management of the classroom, manner and efficacy of disciplining pupils, rapport with parents and other teachers, and ability to withstand the strain of teaching.

(D) The teacher's attendance and disciplinary record, if any.

SECTION 1248 (CONT'D)

(ii) Significant, relevant accomplishments and contributions. This factor shall be based on whether the individual contributes to the overall performance of the school by making clear, significant, relevant contributions above the normal expectations for an individual in his or her peer group and having demonstrated a record of exceptional performance.

(iii) Relevant special training. This factor shall be based on completion of relevant training other than the professional development or continuing education that is required by the employer or by state law, and integration of that training into instruction in a meaningful way.

(c) Except as otherwise provided in this subdivision, length of service or tenure status shall not be a factor in a personnel decision described in subdivision (a) or (b). However, if that personnel decision involves 2 or more employees and all other factors distinguishing those employees from each other are equal, then length of service or tenure status may be considered as a tiebreaker.

MCL 380.1248

MORE ON SECTION 1248

The importance of Section 1248 is that it provides the exclusive remedy for a teacher to challenge a layoff and recall decision.

Under Section 1248, a teacher must file a legal action with the circuit court, and the only remedy is reinstatement.

There is no back pay.

(3) If a teacher brings an action against a school district or intermediate school district based on this section, the teacher's sole and exclusive remedy shall be an order of reinstatement commencing 30 days after a decision by a court of competent jurisdiction. The remedy in an action brought by a teacher based on this section shall not include lost wages, lost benefits, or any other economic damages.



MORE ON SECTION 1248 (CONT'D)

- **As a consequence of this statute, the Tenure Commission no longer has hardly any jurisdiction over layoff and recall decisions.**
- **It used to be that if a probationary teacher was retained over a tenured teacher, the tenured teacher could file a tenure action claiming that the layoff was the result of a subterfuge. Now, the only remedy is the exclusive remedy of filing a legal action in circuit court. *Baumgartner v Perry Public Schools*, 309 Mich App 507 (2015).**

MORE ON SECTION 1248 (CONT'D)

- The most recent version of Section 1249, MCL 380.1249, involving teacher evaluations, incorporate some of the elements of Section 1248 that are to be included in the evaluation system, e.g., an evaluation tool must now account for a teacher's attendance, discipline and ability to withstand the rigors of teaching.



MORE ON SECTION 1248 (CONT'D)

- Although layoff and recall and evaluations are prohibited subjects, Michigan courts have ruled that a teacher may be able to challenge an improperly completed evaluation in the context of a layoff case that was filed in circuit court. *See, Potterville Education Ass'n v Potterville Public Schools*, 2015 Mich App LEXIS 1592, citing *Summer v Southfield Board of Education*, 310 Mich App 660 (2015); *Iv app denied*, 872 NW2d 465 (2015).



RECALL RIGHTS

Formerly, under the Teachers' Tenure Act, a teacher had recall rights for a period of at least three years.



Now, there is no specific time period that a teacher is entitled to recall rights.

BOARD OF EDUCATION

In addition to Section 1248, it is very important for the Board of Education to adopt a policy relating to layoff and recall and to promulgate administrative regulations defining the criteria for determining layoff and recall, that are consistent with Section 1248, e.g., the Board policy and administrative regulation should identify how long teachers can be on layoff and recall.



OTHER TENURE CONSIDERATIONS

Technically, tenured teachers may still have greater protection in a layoff situation than probationary teachers, unless the probationary teacher has a higher evaluation rating than the tenured teacher.

Nevertheless, the best practice is that a tenured teacher with a minimally effective evaluation should still be retained over a probationary teacher that has an effective evaluation, since under Section 1249, tenured teachers are to be given ample chances to improve their performance.



OTHER CONSIDERATIONS

- **One further consideration that applies to teachers, as well as all employees:**
 - **In deciding and implementing any layoff and recall decision, public school employers are still held accountable to comply with state and federal discrimination laws. Otherwise, any unlawful discrimination, e.g., age discrimination, would be illegal and would be subject to court litigation or administrative complaints and charges of discrimination.**



NON-TEACHING PROFESSIONAL EMPLOYEES

- **Many of the above legal considerations apply to tenured teachers. Most professional bargaining units also have other licensed professionals who are not tenured teachers, e.g., speech therapists, physical therapists, social workers, counselors and psychologists.**
- **The typical practice is to treat these other professional employees, sometimes referred to as ancillary employees, under the traditional layoff and recall contractual provision, that is, their layoff and recall must be treated as a mandatory subject of bargaining.**

LAYOFF AND RECALL OF ADMINISTRATORS



GENERAL PRINCIPLE OF COLLECTIVE BARGAINING

There are some collective bargaining units for administrators. There is a question that if the administrator holds a teaching license, whether layoff and recall would be considered a prohibited subject of bargaining.



SECTION 1229

Whether administrators are represented for the purposes of collective bargaining or not, a public school employer must be aware of Section 1229 of the Michigan Revised School Code, MCL 380.1229 regarding non-renewal.

(2) The board of a school district or intermediate school district may employ assistant superintendents, principals, assistant principals, guidance directors, and other administrators who do not assume tenure in that position under 1937 (Ex Sess) PA 4, MCL 38.71 to 38.191. The employment shall be by written contract. The term of the employment contract shall be fixed by the board, not to exceed 3 years. The board shall prescribe the duties of an individual described in this subsection. If written notice of nonrenewal of the contract of an individual described in this subsection is not given at least 60 days before the termination date of the contract, the contract is renewed for an additional 1-year period. However, for an individual described in this subsection who is employed by a community district, the minimum time period for the written notice required under this subsection is 30 days.

SECTION 1229 (CONT'D)

(3) A notification of nonrenewal of contract of an individual described in subsection (2) may be given only for a reason that is not arbitrary or capricious. The board shall not issue a notice of nonrenewal under this section unless the affected individual has been provided with not less than 30 days' advance notice that the board is considering the nonrenewal together with a written statement of the reasons the board is considering the nonrenewal. However, for an individual described in subsection (2) who is employed by a community district, the minimum time period for the advance notice required under this subsection is 7 days. After the issuance of the written statement, but before the nonrenewal statement is issued, the affected individual shall be given the opportunity to meet with not less than a majority of the board to discuss the reasons stated in the written statement. The meeting shall be open to the public or a closed session, as the affected individual elects under section 8 of the open meetings act, 1976 PA 267, MCL 15.268. If the board fails to provide for a meeting with the board, or if a court finds that the reason for nonrenewal is arbitrary or capricious, the affected individual's contract is renewed for an additional 1-year period. This subsection does not apply to the nonrenewal of the contract of a superintendent of schools described in subsection (1).

MCL 380.1229

SECTION 1229 – ONE SIGNIFICANT EXCEPTION

- **There is one significant exception to the non-renewal requirements of Section 1229. Michigan cases have ruled that Section 1229 non-renewal requirements do not apply to an economic layoff. *Roberts v Beecher Community School District*, 143 Mich App 266 (1985).**



LAYOFF VS. NON-RENEWAL

What is the distinction between layoff vs non-renewal?

A **non-renewal** means complete termination of the employment relationship.



In contrast, **layoff** means that the laid off administrator still has recall rights with the District.

Consequently, it is important for the Board policy and/or administrative guideline to define the criteria for layoff and an administrator's recall rights.

BEST PRACTICE TIP

- **If the District has no intention of keeping an administrator who has been identified for layoff, then the better approach is to simply follow the non-renewal requirements of Section 1229 and completely sever the employment relationship, citing economic conditions as a reason that is not arbitrary and capricious.**



LAYOFF AND RECALL OF SUPPORT STAFF



MANDATORY SUBJECT OF BARGAINING

Layoff and recall of support staff are mandatory subjects of bargaining. Layoff and recall issues must be collectively bargained with their bargaining unit agent, and layoff and recall of support staff, who are represented for the purposes of collective bargaining, are controlled by the collective bargaining agreement.



ISSUES TO BE ADDRESSED

There are a number of issues that must be addressed in collective bargaining negotiations:

1. The role of seniority.
2. The role of best qualified employee.
3. The universe of bumping rights, *e.g.*, bargaining unit bumping rights as opposed to job classification bumping rights.
4. Consequences of a part-time layoff, or reduction from full-time to part-time.
5. The scope of bumping rights and the factors to be considered in bumping rights.

BUMPING RIGHTS

- **From a management prospective, it is important to minimize the disruption that may be caused by employees' bumping rights. Any employee who bumps into another position should be qualified and able and willing to immediately perform the existing work.**
- **Factors to consider:**
 - Seniority
 - Qualifications
 - Evaluations
 - Attendance
 - Disciplinary record



RECALL

With respect to recall considerations, the following are important:

1. How long should an employee have recall rights – 6 months, one year, three years?
2. What type of notice is required to notify an employee of the fact that they are being recalled?
3. What is the response time for the employee to confirm that they want to accept the offer of recall?



UNEMPLOYMENT CONSIDERATIONS



GENERAL PRINCIPLE

An employee losing their job through layoff is typically entitled to unemployment benefits, which is usually paid out of current revenues.



Consequently, in calculating the savings vs. costs of any layoff decision, it is important for the school district to account for unemployment costs.

LAYOFF – SIGNIFICANT EXCEPTION

There is one significant exception in layoff of school employees, which involves between academic years.

- (1) With respect to service performed in an instructional, research, or principal administrative capacity for an institution of higher education as defined in section 53(2), or for an educational institution other than an institution of higher education as defined in section 53(3), benefits shall not be paid to an individual based on those services for any week of unemployment beginning after December 31, 1977 that commences during the period between 2 successive academic years or during a similar period between 2 regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, to an individual if the individual performs the service in the first of the academic years or terms and if there is a contract or a reasonable assurance that the individual will perform service in an instructional, research, or principal administrative capacity for an institution of higher education or an educational institution other than an institution of higher education in the second of the academic years or terms, whether or not the terms are successive.

*Michigan Employment Security Act Act 1 of 1936 (Ex. Sess.)
Section 421.27(6)(i)(1)*

Applies to support staff as well. MCL 421.27(i)(2); *Adams v West Ottawa Schools*, 277 Mich App 461 (2008).

UNEMPLOYMENT – TWO REQUIREMENTS

According to Michigan case law, there are two requirements to avoid paying unemployment between the academic seasons or summer months:

1. Promise or reasonable expectation of employment in the next term.
2. Substantially similar compensation and benefits as the previous year. *Paynes v Detroit Board of Education*, 150 Mich App 358 (1986).

Accordingly, before the end of the school year, it is important to notify employees that the District intends to employ them the following school year at the same or similar compensation and benefits.

Failure to do so may result in unemployment costs!



CLAWBACK PROVISION

Michigan courts have allowed public school employers to negotiate clawback provisions that if unemployment is paid to an employee for the summer months but then the employee is recalled, the employer can deduct the unemployment paid from the employee's paycheck to recoup the amount of unemployment paid for the summer months. These collective bargaining provisions can be legally negotiated. *Oak Park Education Association v Oak Park Board of Education*, 132 Mich App 680 (1984).





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THANK YOU!



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